# In the Supreme Court

OF THE

# United States

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OCTOBER TERM, 1972

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No.

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MICHIGAN NATIONAL BANK,
a National Banking Association, *Petitioner,*

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA,
*Respondent,*
LARRY H. KELL, *Real Party in Interest.*

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the Court of Appeal of the State of California

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### INTRODUCTION

The issues raised in the petition of Michigan National Bank were first argued in a motion before the California Court of Appeal, First Appellate District, Division One, prior to the motion which petitioner seeks to have reviewed. *Michigan National Bank* v.

*Superior Court,* 23 Cal. App. 3d 5, 99 Cal. Rptr. 823 (1972). The denial of petitioner's first motion became final on February 23, 1972. Petitioner did not seek review of that judgment, either in the California Supreme Court or in this Court. The previous decision was res judicata in petitioner's second appeal to the Court of Appeal, Division Three, on which petitioner now seeks review.

The Writ should be denied since judgment on this issue was entered more than ninety (90) days prior to filing of the petition, when the opinion of the earlier Court of Appeal was entered. 28 U.S.C. Section 2101 (c). It should also be denied since the decision of that earlier Court of Appeal, not having been appealed, is now res judicata.

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**STATEMENT OF THE CASE**

Respondent and Real Party in Interest, Larry H. Kell, commenced action No. 122,937 in the Superior Court of the State of California, in and for the County of Contra Costa, on November 4, 1970, for the unlawful taking and conversion of his personal property, an airplane. Service of summons was made on defendant-petitioner, Michigan National Bank, a National Banking Association (hereinafter Michigan N. B.) through the office of the Secretary of State.

On June 4, 1971, Michigan N.B. filed a motion to quash service of summons, based on the venue provision of Title 12, U.S.C. Section 94 which provided

for suit in the State in which the bank is established. After written and oral arguments the motion to quash was denied.

Michigan N.B. then filed a motion to stay action or dismiss pursuant to Section 418 (a) (2) of the California Code of Civil Procedure, *upon the same ground* that the venue requirements of Title 12, United States Code, Section 94, required that said action either be dismissed or be transferred to and tried in the State of Michigan.

On July 12, 1971, Michigan N.B. filed a Petition for Writ of Mandate in the Court of Appeal, State of California, First Appellate District, Division One, and the hearing of Michigan's motion to stay or dismiss was continued by stipulation of the parties pending a decision. On January 24, 1972, the Court of Appeal filed its opinion, *Michigan National Bank v. Superior Court,* 23 Cal. App. 3d 5, 99 Cal. Rptr. 823 (1972), denying the Petition for Writ of Mandate on the following grounds:

> 1. That Michigan N.B. solicited within the State, with its forms, the refinancing of sales of airplanes, sold within the State, and to be harbored in the State.
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> 2. That respondent Kell, the purchaser and plaintiff, alleged he was wronged within the State by the bank's unlawful action in taking, converting, and disposing of his airplane, which was purchased in this State by plaintiff, and financed on forms executed in this State which in-

dicated that Michigan N.B. would be the Real Party in Interest in the payment of the purchase price.

3. That it was contemplated that the airplane would be based in the county where the action was commenced and it is alleged the airplane was seized there.

On the basis of the foregoing facts, the Court of Appeal concluded that:

1. Michigan N.B. is doing business in California and therefore is subject to the jurisdiction of the Courts of the State of California.

2. Michigan N.B. has, on the facts, waived its federally given right to have actions in which it is named as a defendant, tried in the State and district where the bank is "established", i.e., the State of Michigan.

Subsequent to the filing of this opinion on January 24, 1972, Michigan N.B. filed a Petition for Rehearing. The opinion was modified solely by adding further citation on February 23, 1972, at the same time the petition for rehearing was denied. *Michigan National Bank v. Superior Court,* 23 Cal. App. 3d 5, 99 Cal. Rptr. 823 (1972).

Michigan N.B. failed to file a petition for hearing in the California Supreme Court within the required time, and was subsequently denied relief from default due to inadvertence and mistake by the California Supreme Court.

Next, the motion to stay or dismiss which had previously been filed before the Superior Court was argued by Michigan N.B., on the same grounds as its now-denied Writ of Mandate. The Superior Court of Contra Costa County therefore denied Michigan's motion to stay or dismiss on July 3, 1972.

On July 13, 1972, Michigan N.B. again filed a Petition for Writ of Mandate in the Court of Appeal of the State of California, First Appellate District, Division Three. Michigan again argued the same contentions that had been made, and had been rejected, in its previous Petition for Writ of Mandate. This time the Petition for Writ of Mandate was denied without opinion.

To quote from Michigan's Statement of the Case:

> "It seems clear that the denial of this Petition for Writ of Mandate, without opinion, is based primarily on the decision of the Court of Appeal of the State of California, First Appellate District, Division One, which was filed on January 24, 1972, and subsequently modified on February 23, 1972."

The second Petition for Writ of Mandate was rejected because, as plaintiff-respondent Kell pointed out in his brief, it was an attempt to argue *the very same issues* decided by the prior petition. The first Court of Appeals decision was res judicata in Michigan's attempt to relitigate the issue of venue for, and jurisdiction over, defendant Michigan N.B.

Michigan N.B. was denied a hearing by the California Supreme Court on September 20, 1972.

**DISCUSSION**

Petitioner Michigan N.B. sought and received a determination of its claim that plaintiff Kell should be denied access to the Courts of this State and compelled to travel to Michigan with his witnesses to sue for an airplane that he had purchased, financed and based within California, which had been wrongfully converted within California. The first denial of a petition for Writ of Mandamus, in Division One of the First Appellate District Court of Appeal, held for plaintiff in a detailed opinion which carefully considered Michigan's contentions. Michigan did not appeal from that decision, filed January 24, 1972, and modified by adding further citations on February 23, 1972. That denial became final when filed. Cal. Rules of Court 24 (a).

It is well settled that a final judgment rendered upon the merits of an application for a peremptory Writ of Mandamus comes within the principle of res judicata, and is a bar to another application for the same writ by the same party under the same circumstances, or to another action involving the same issues and in which the same relief is sought. *Price v. Sixth District Agricultural Association,* 201 Cal. 502, 515, 258 P. 387 (1927).

The first Denial of Petition for Writ of Mandate was thus conclusive and binding on petitioner Michigan's attempt to reargue the issues previously decided.

Petitioner Michigan's Petition is therefore wholly without merit. Under the guise of appealing a denial

without opinion of a Petition for Writ of Mandamus, Michigan N.B. seeks to gain still another opportunity to argue an issue which has already been decided between respondent and petitioner more than ninety (90) days prior to filing of his petition for Writ of Certiorari. Petitioner Michigan N.B. is, in fact, attempting to try its case all over again in the Supreme Court, with the added hindsight of its unsuccessful attempt in the Third Division, First District Court of Appeal, to relitigate the adverse decision rendered in the First Division, First District Court of Appeal.

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**CONCLUSION**

Petitioners have received a full and thorough adjudication of these very issues in their first go-around in the California Court of Appeal. The adverse decision that resulted is res judicata. Yet petitioners now seek to relitigate the very same contentions that were previously raised and resolved.

Since petitioners never sought any review of that earlier judgment on this issue, and since it became final more than ninety (90) days prior to filing the Petition for Writ of Certiorari should be denied.

Dated, December 11, 1972.

Respectfully submitted,

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*Attorney for Real Party in Interest.*